

The sole issue on appeal is whether respondent is entitled to have the costs of the examinations by Dr. Frederick Wolfe and Dr. Roy Lacoursiere reimbursed as a part of respondent's subrogation rights to the proceeds from the settlement claimant made in a third party liability action. Respondent initially raised additional issues relating to whether claimant was obligated to attend the examination scheduled with Dr. Lacoursiere and

whether respondent should be entitled to suspend benefits for unreasonable refusal to submit to examination. Claimant has now attended the scheduled examination, and respondent has withdrawn all issues except their entitlement to credit or reimbursement from the settlement proceeds.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order by the Administrative Law Judge should be affirmed.

In December 1993 claimant filed this workers compensation claim alleging injury arising out of and in the course of her employment on June 8, 1993. Claimant also filed a third party negligence action which was settled while the workers compensation claim was pending.

On February 17, 1997, after claimant settled the third party claim, respondent scheduled a physical examination of claimant by Dr. Frederick Wolfe and a psychological evaluation by Dr. Roy Lacoursiere. Claimant objected to the examinations and objected to respondent's stated intention to credit the costs of these examinations against the proceeds from the settlement of the third party action. These objections were expressed by motion and a hearing was held April 4, 1997. The facts were not in dispute and after hearing arguments by the parties, the Administrative Law Judge entered the Order which is the subject of this appeal. As indicated, the only remaining issue is whether respondent is entitled to credit for the costs of these examinations.

Respondent relies on the following provisions of K.S.A. 1992 Supp. 44-504:

(b) In the event of recovery from such other person by the injured worker . . . the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of such recovery Whenever any judgment in any such action, settlement or recovery otherwise is recovered by the injured worker . . . the amount of such judgment, settlement or recovery otherwise actually paid and recovered which is in excess of the amount of compensation and medical aid paid to the date of recovery of such judgment, settlement or recovery otherwise shall be credited against future payments of the compensation or medical aid. . . .

(f) As used in this section, "compensation and medical aid" includes all payments of medical compensation, disability compensation, death compensation, including payments under K.S.A. 44-570 and amendments thereto, and any other payments made or provided pursuant to the workers compensation act.

Respondent contends that the costs of the scheduled examinations were payments for medical aid or, in the alternative, constitute "other payments made or provided pursuant to the workers compensation act." Respondent cites in support the decision by the Kansas Court of Appeals in Varner v. Gulf Ins. Co., 18 Kan. App. 2d 801, 859 P.2d 414 (1993). In the Varner decision the Court ruled that costs of vocational rehabilitation were costs subject to reimbursement or credit against the proceeds from the third party liability action.

Claimant contends, on the other hand, that the issue is controlled by the following more specific provisions of K.S.A. 44-515:

The employee shall not be liable for any fees or charge of any health care provider selected by the employer for making any examination of the employee.

The Appeals Board concludes that K.S.A. 44-515 does control as to cost of examination done at respondent's request. That statute authorizes the respondent to schedule an examination of the claimant at any reasonable time and place during the pendency of the claim. The costs of that examination, including any costs of travel and lodging, are to be paid by the respondent and, as claimant emphasizes, the statute provides that claimant cannot be required to pay any of the costs of these examinations.

In this case, respondent's counsel describes the purpose for the examination by Dr. Wolfe as follows:

MR. GATES: I'm not arguing she's not at maximum medical. I think we're just arguing as to what is the condition she suffers from. I think we've got a disagreement as to whether or not she suffers from fibromyalgia and we want to get another opinion concerning that issue.

Respondent's counsel also indicates that Dr. Wolfe may or may not be authorized to provide treatment if he, Dr. Wolfe, considers additional treatment appropriate. Respondent's counsel also indicates that the psychologist, Dr. Lacoursiere, may or may not be authorized to provide treatment. The Board finds the examinations were scheduled by respondent primarily to obtain expert opinions for use in the litigation of the workers compensation case.

The circumstances presented here differ in at least two respects from those considered in the Varner decision. First, the payments made in Varner were for a benefit provided to the claimant. More importantly, however, the Varner decision did not involve a statute which specifically prohibits assessing the costs against the claimant. The Appeals Board finds in this case that the specific language of K.S.A. 44-515 controls. The costs for the examinations and evaluations by Dr. Wolfe and Dr. Lacoursiere cannot be credited against the proceeds from settlement of the third party claim.

WHEREFORE, the Appeals Board finds that the Order by Administrative Law Judge Bryce D. Benedict denying respondent's request to credit the costs of the examination and evaluation by Drs. Wolfe and Lacoursiere pursuant to K.S.A. 44-504(b) should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Scott M. Gates, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director